

BRENDA K. LADUCER-BERCIER,	:	Order Vacating Decision and
Appellant	:	Remanding Case
	:	
v.	:	
	:	Docket No. IBIA 97-115-A
ABERDEEN AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	March 19, 1998

Appellant Brenda K. Laducer-Bercier seeks review of a February 27, 1997, decision of the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), reversing a November 26, 1996, decision of the Superintendent, Turtle Mountain Agency, BIA (Superintendent). The Superintendent had approved the partitioning of Turtle Mountain Allotment 5077. For the reasons discussed below, the Board of Indian Appeals (Board) vacates the Area Director's decision and remands this matter for further consideration.

The Area Director's decision indicates that Albert Laducer had owned the full interest in Allotment 5077. Albert had seven children--Roger, Melvin, Linus, Eugene, Sylvia, Theresa, and Deloris. By gift deed, he conveyed specific parcels along the northern and western edges of the allotment to Roger, Melvin, Linus, Eugene, and Sylvia. Upon Albert's death, Theresa received a separate parcel, and Albert's seven children each received a 1/7 interest in the remainder of the allotment, which apparently contained approximately 120.38 acres. Deloris was the only one of Albert's children who did not receive a specific parcel from the allotment. Theresa gift deeded her 1/7 interest to Vivian M. LaBlanche; Sylvia gift deeded her 1/7 interest to Robert Laducer; Eugene gift deeded 1/60 of his 1/7 interest to Lois Bercier; and Linus gift deeded 1/32 of his 1/7 interest to Appellant, his daughter. At some point, Roger died, leaving Mary C. Laducer as his probable heir.

In 1994, Appellant obtained permission to live on the allotment from all of the co-owners except Deloris and Vivian. 1/ Appellant apparently began making improvements to the property and moved onto it.

On April 4, 1996, Appellant petitioned to partition the allotment, so that she would have sole ownership of the 3.75-acre parcel on which she had been living. By letter dated May 24, 1996, the Superintendent notified the co-owners of Appellant's petition. The Superintendent gave the co-owners

1/ The Area Director's decision states that Deloris and "Virginia" did not give permission. Because there is no "Virginia" shown to own an interest in the allotment, the Board assumes that the Area Director meant Vivian.

30 days in which either to sign and return a form consenting to the partition or to present their objections. The co-owners were informed that failure to respond would be deemed consent to the partition.

Lois, Melvin, Linus, Robert, Eugene, and Appellant indicated that they did not object to the partition. Vivian did not respond. Deloris objected, alleging that Albert had verbally given her the parcel which Appellant sought. Mary also objected, arguing that the proposed partition would limit access to the interior of the allotment.

On November 26, 1996, the Superintendent approved the partitionment. He informed the co-owners of this decision in letters dated December 3, 1996. The Superintendent's letters properly informed the co-owners of the right to appeal to the Area Director and of the 30-day time limit for filing an appeal. See 25 C.F.R. §§ 2.7(c) and 2.9(a).

Deloris appealed. On February 27, 1997, the Area Director reversed the Superintendent's decision to partition the allotment.

Appellant appealed to the Board. Only Appellant and Deloris filed statements with the Board.

Appellant's first argument is that Deloris' Notice of Appeal to the Area Director was untimely. Under 25 C.F.R. § 2.9(a),

[a]n appellant must file a written notice of appeal in the office of the official whose decision is being appealed. The appellant must also send a copy of the notice of appeal to the official who will decide the appeal and to all known interested parties. The notice of appeal must be filed in the office of the official whose decision is being appealed within 30 days of receipt by the appellant of the notice of administrative action described in §2.7. A notice of appeal that is filed by mail is considered filed on the date that it is postmarked. The burden of proof of timely filing is on the appellant. No extension of time shall be granted for filing a notice of appeal. Notices of appeal not filed in the specified time shall not be considered, and the decision involved shall be considered final for the Department and effective in accordance with §2.6(b).

The return receipt (green card) for Deloris' copy of the Superintendent's decision shows a date of receipt of December 4, 1996. The green card was signed in the space marked "Signature - Agent" by someone other than Deloris.

The copy of Deloris' handwritten Notice of Appeal in the record is addressed to the Superintendent, and is dated January 9, 1997. It is date-stamped as having been received on January 9, 1997. The date stamp does not show the office in which the Notice of Appeal was received. There is a printed parenthetical comment on the bottom of the one-page Notice of Appeal which reads "(See back)." On the reverse side is a handprinted statement signed by Deloris concerning when she personally received the

Superintendent's decision. A date stamp at the bottom of that statement reads January 6, 1997.

Nothing in the record shows how Deloris delivered her Notice of Appeal to the Superintendent. There is no copy of an envelope in which it might have been mailed, and no notation that it was hand-delivered.

The Area Director did not discuss the timeliness of Deloris' Notice of Appeal in his decision. Neither does Deloris address this issue in the statement she filed with the Board. 2/

Based on the limited information before it, the Board finds that it is possible that Deloris' Notice of Appeal to the Area Director was not timely filed. However, because the information necessary for a conclusive finding is not part of the administrative record, the Board concludes that the Area Director's February 27, 1997, decision must be vacated and this matter remanded to him for further consideration.

The determination of whether the Notice of Appeal was timely must be based on the requirements of 25 C.F.R. § 2.9(a). If the Notice of Appeal was not timely, the Area Director should dismiss this appeal. If, however, the Notice of Appeal was timely, the Area Director should require Deloris to provide a copy of her Notice of Appeal to all interested parties and allow those interested parties to participate in the proceedings in accordance with 25 C.F.R. § 2.11. 3/

2/ Although Deloris filed this statement before Appellant filed her Opening Brief, the Board's Apr. 28, 1997, Notice of Docketing informed opposing parties of their right to respond to Appellant's Opening Brief.

3/ Although not raised by Appellant, nothing in the record shows that Deloris sent a copy of her Notice of Appeal to interested parties, or that the Superintendent or the Area Director furnished copies to interested parties. The only documents in the record later than Deloris' Notice of Appeal are a Jan. 16, 1997, memorandum from the Superintendent, transmitting the appeal to the Area Director, and the Area Director's decision. Thus, it appears that interested parties were not informed that Deloris had filed an appeal, and were not allowed to participate in that appeal.

On several occasions, the Board has addressed an Area Director's issuance of decisions prior to the expiration of the times set out in the regulations for interested parties to file responses, and the resulting denial of due process. See, e.g., Scott v. Acting Aberdeen Area Director, 25 IBIA 115 (1994); Meeks v. Aberdeen Area Director, 23 IBIA 200 (1993); Cheyenne River Sioux Tribe v. Aberdeen Area Director, 23 IBIA 103 (1992); Jerome v. Acting Aberdeen Area Director, 23 IBIA 137 (1992). In Cheyenne River Sioux Tribe v. Acting Aberdeen Area Director, 28 IBIA 288, 293 (1995), the Board held that it was clear error for an Area Director to issue a decision prior to the expiration of the time periods for responding to an appeal, and without notice to interested parties that an appeal had been filed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Aberdeen Area Director's February 27, 1997, decision is vacated, and this matter is remanded for further consideration in accordance with this decision. 4/

Kathryn A. Lynn
Chief Administrative Judge

Anita Vogt
Administrative Judge

4/ Because of its disposition of this matter, the Board does not reach Appellant's substantive arguments.